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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LARRY ALBERT BOARDMAN, Defendant and Appellant.	G055897 (Super. Ct. No. 14NF4140) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Thomas M. Goethals, Judge. Affirmed and remanded with directions.

Susan S. Bauguess, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Allison V. Acosta, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Larry Albert Boardman of assault with a deadly weapon (Pen. Code § 245, subd. (a)(1)),[1] assault (§ 240), and battery (§ 242). Boardman contends the trial court erred in denying his motion for mistrial, in refusing to give his requested jury instructions, and in denying his new trial motion. Boardman also challenges the sufficiency of the evidence to support the jury's findings Boardman did not act in self-defense as to any of the crimes or accidentally as to the aggravated assault. None of these arguments has merit.

Boardman correctly argues, however, that recent statutory changes mandate a remand to the trial court for resentencing. Effective January 1, 2019, amended versions of sections 667, subdivision (a)(1), and 1385, subdivision (b), give the trial court discretion to dismiss prior serious felony enhancements in the interests of justice. In light of these statutory changes, we remand for resentencing, but otherwise affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

The Incident

On September 30, 2014, T.K. was living in an apartment in Yorba Linda with her four-year-old son. She was in a sexual relationship with Boardman, who had slept over the previous night.

Douglas C., the child's father, lived elsewhere and had an informal custody arrangement with T.K. Douglas would see their son on his days off work, sometimes picking the child up from T.K.'s apartment. Douglas would always text first before coming over.

Douglas texted T.K. in the late afternoon to say he would come by for Ethan. Because Boardman had not yet left after spending the night, T.K. texted Douglas

[1] All further statutory references are to the Penal Code unless otherwise noted.

back, saying "he was not allowed to just walk into my apartment." T.K. knew Douglas would be "not [be] happy" she had a male guest. Hoping to avoid "words" between the two men, T.K. "asked [Boardman] not to say anything and to stay in the back patio."

T.K. met Douglas in front of the apartment and told him he was not allowed inside, but he brushed past her and walked in. T.K. yelled at Douglas "to get out." Boardman did not stay on the back patio as requested, but came into the living room. The two men got into a verbal altercation that quickly became physical. Boardman threw the first punch, striking Douglas in the jaw. T.K. saw both men "entangled in each other," and heard Douglas ask, "You are going to stab me with my son in the next room?"

T.K. tried to get between the two men, using her hands to push them apart. She saw Douglas "jumping back" and then "felt a sharp pain" in her hand, looked down, and saw blood. She dropped to the floor, screaming. Boardman ran out the front door.

Meanwhile, T.K.'s next door neighbor, Sylvia Rangel, noticed the commotion coming from T.K.'s apartment. Rangel had just returned from the market and was unloading groceries with the help of her granddaughter's boyfriend, Wayne Riddle, when the walls of her apartment started shaking. Alarmed, Rangel went next door to "see what was going on" and to check on T.K. Rangel saw two men "struggling in the kitchen area"; Douglas's hands were up and he appeared to be "dodging" or "protecting his self or, like, jumping back[.]" Then the other man ran past her and out the door, with Douglas in pursuit.

Rangel watched as the escaping Boardman hit Wayne, who was standing on the sidewalk outside the apartment. Rangel testified Boardman's attack on Wayne "happened in two seconds. Like, fast." She saw "the guy fly by me and Wayne standing on the sidewalk. And I just see him [Wayne], like, put his arms up, like, trying to protect his self because this person is punching at him or whatever." Then Rangel saw Boardman run away, chased briefly by both Douglas and Wayne.

Wayne suffered a cut on his chest, a chipped tooth, a "busted lip," and an apparent stab wound near his left shoulder. When Douglas returned to T.K.'s apartment after the chase, he found T.K. lying on the kitchen floor in a pool of blood. The cut on her wrist required stitches and nerve reconstruction surgery.

The Charges

After police apprehended Boardman, the District Attorney charged him with assault with a deadly weapon with great bodily injury as to T.K. (count 1), assault with a deadly weapon as to Wayne (count 2), and misdemeanor assault and misdemeanor battery (counts 3 and 4, respectively) as to Douglas. The information alleged Boardman had nine strike priors under sections 667, subdivisions (d) and (e)(2)(A), and 1170, subdivisions (b) and (c)(2)(A), including two prior serious or violent felonies under section 667, subdivision (a). The information further alleged a prior prison term enhancement under section 667.5, subdivision (b).

The Trial and Sentencing

The jury found Boardman not guilty on count 1, and guilty on counts 2, 3, and 4. The trial court found all the alleged prior convictions to be true, and denied Boardman's new trial motion.

At sentencing, the trial court struck eight of Boardman's nine strike priors, and the prior prison term enhancement. The court sentenced Boardman to an aggregate prison term of 16 years, comprised of a three year midterm on count 2, assault with a deadly weapon, and doubled to six years for the prior strike conviction, together with five years for each of his two prior serious or violent felony convictions under section 667, subdivision (a). The court suspended sentence on counts 3 and 4.

II

DISCUSSION

A. *The Trial Court Did Not Abuse its Discretion in Denying the Motion for Mistrial*

Defense counsel moved for a mistrial after the prosecutor, while questioning a deputy sheriff, mistakenly used Boardman's name when he meant to refer to another witness the deputy interviewed at the scene. Defendant contended these references to Boardman inferentially commented on Boardman's invocation of his Fifth Amendment right to silence in violation of *Doyle v. Ohio* (1976) 426 U.S. 610, 618 (*Doyle*), and this "*Doyle*-type" error required a mistrial. The trial court found the prosecutor's short-lived confusion over names did not prejudice Boardman and denied the motion for mistrial. Boardman argues that decision effectively denied him a fair trial, mandating reversal of the judgment. We disagree.

Following Boardman's arrest and *Miranda* advisements, Boardman made no statements and invoked his right to an attorney. *Doyle* error occurs when a prosecutor refers to the post-*Miranda* silence of a defendant, either in questioning a witness or during jury argument, thereby impeaching the defendant and penalizing his exercise of his constitutional rights. (*People v. Coffman* (2004) 34 Cal.4th 1, 65; *People v. Evans* (1994) 25 Cal.App.4th 358, 368.)

The purported *Doyle* error occurred during the prosecutor's questioning of Deputy Steven Soto. The prosecutor asked Soto about his interview of Douglas at the scene and tried to pin down whether Soto specifically asked Douglas about "who hit who first." In a colloquy that became increasingly confusing, the prosecutor first mistakenly used Boardman's name rather than Douglas's when he asked Soto, "Do you specifically recall that you did not ask Mr. Boardman about who hit who first, or are you trying to recall?" Soto responded that he could not "specifically remember if I asked him who hit who first." After Soto looked at his incident report to refresh his recollection, the

prosecutor repeated his error: "Now, after reading that report do you recall if Mr. Boardman told you who hit who first?" Soto asked, "You mean Douglas?" The prosecutor responded, "I apologize. Yes. Speaking to [Douglas] — that was my mistake. Speaking to [Douglas], do you recall if he told you who hit who first?"

Out of the jury's presence, defense counsel voiced his concern that the prosecutor's mistaken references to Boardman implied Deputy Soto interviewed him as well as Douglas at the scene. Defense counsel asserted that because Boardman invoked his right to remain silent, the jury "is going to think, 'Well, the defendant is not making statements,'" and might make "an inference of guilt," using Boardman's silence against him in violation of *Doyle*, *supra*, 426 U.S. at p. 618. Based on that "*Doyle*-type" error, defense counsel moved for a mistrial.

The trial court saw things differently and denied the request for a mistrial. The court noted the prosecutor "for some reason" seemed to get "the wrong name stuck in [his] brain," but while this "prosecutorial error" involved "potential *Doyle* error," it was not "so prejudicial as to require a mistrial." The court offered to give an appropriate instruction if requested by the defense, but suggested it might be unwise "to underscore this momentary lapse . . . when it is likely the jurors will have forgotten about it long before they ever hear instructions and argument . . . ."

A mistrial motion should be granted "'only when a party's chances of receiving a fair trial have been irreparably damaged[.]'" (*People v. Clark* (2011) 52 Cal.4th 856, 990 (*Clark*).) "Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions." (*People v. Haskett* (1982) 30 Cal.3d 841, 854 (*Haskett*).) The inquiry is necessarily "a nuanced, fact-based analysis" best performed by the trial court. (*People v. Chatman* (2006) 38 Cal.4th 344, 369-370.) We review a trial court's order denying a motion for mistrial under the deferential abuse of discretion standard. (*Clark*, *supra*, 52 Cal.4th at p. 990.)

Boardman contends the trial court abused its discretion in denying his motion for mistrial because "[t]he confusion in the names by the prosecutor . . . clearly penalized him for exercising his constitutional right to remain silent[.]" Boardman asserts "[t]here can be no question that if the jury believed appellant refused to answer any questioning by Soto, [then] his silence could be construed as an inference of guilt." But Boardman's assertion he was "clearly penalized" by the prosecutor's error does not does not stand up to scrutiny.

When the prosecutor questioned Soto at trial, the jury already heard from four prosecution witnesses, all of whom said Boardman fled the scene immediately after the incident. Given the undisputed evidence Boardman was gone when Soto questioned witnesses at the scene, there was no reasonable basis for the jury to believe Soto questioned Boardman at the scene and Boardman refused to answer the questions. Even if the jury had been confused initially when the prosecutor incorrectly used Boardman's name in place of Douglas's name, the prosecutor cleared up that confusion after Soto asked, "You mean Douglas?" The prosecutor immediately acknowledged his mistake and clarified that his question to Soto concerned Soto's conversation with *Douglas* at the scene: "I apologize. Yes. Speaking to [Douglas] — that was my mistake. Speaking to [Douglas], do you recall if he told you who hit who first?"

Having failed to demonstrate prejudice from the prosecutor's mistaken references to him while questioning Soto, Boardman likewise fails to establish the trial court abused its discretion in denying the motion for mistrial. The court acted within its "considerable discretion" in concluding the prosecutor's error here was not "incurably prejudicial," requiring a mistrial. (*Haskett*, *supra*, 30 Cal.3d at p. 854-855.)

B. *The Trial Court Properly Declined Boardman's Requested Instruction*

Boardman argues the trial court erred in refusing to instruct the jury with CALCRIM 3477 relative to counts 3 and 4, the assault and battery against Douglas. This

jury instruction, based on section 198.5, would have told the jury "that a person using force within his or her residence against a person who forcibly entered the residence shall be presumed to have held a reasonable fear of injury to self or another member of the household." (*People v. Grays* (2016) 246 Cal.App.4th 679, 684-685, fn. omitted (*Grays*).) The instruction creates a rebuttable presumption requiring the prosecution to prove beyond a reasonable doubt that Boardman did *not* have a reasonable fear of injury when he encountered Douglas in the apartment. (Evid. Code, § 606 [presumption imposes on People burden of proof as to nonexistence of presumed fact].) Boardman argues the trial court wrongly concluded Boardman was not entitled to the presumption of reasonable fear of injury under section 198.5.

We apply a de novo standard of review to claims of instructional error, which involve questions of law. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569.) A defendant is entitled to instructions on an affirmative defense if supported by substantial evidence. (*People v. Salas* (2006) 37 Cal.4th 967, 982.) We conclude, as the trial court did, the evidence did not support instructing the jury with the presumption of reasonable fear under section 198.5.

The trial court cited two grounds for refusing to instruct the jury with CALCRIM 3477. The first ground was the court's understanding, based on *People v. Brown* (1992) 6 Cal.App.4th 1489, 1494, that the section 198.5 presumption applied in the context of a residential burglary and the facts of this case did not support a finding that Douglas was a burglar. The court's second ground for refusing the instruction was an implicit finding Boardman was not a resident of the apartment.

We need not address the trial court's first ground for refusing the requested instruction because the second ground is clearly correct. Case law holds that the section 198.5 reasonable fear presumption applies only to a *resident* who used deadly force against an intruder, and no evidence shows Boardman was a resident of T.K.'s apartment.

In *People v. Silvey* (1997) 58 Cal.App.4th 1320 (*Silvey*), the defendant appealed his voluntary manslaughter conviction, arguing the trial court erred in failing to instruct the jury sua sponte with the reasonable fear presumption under section 198.5. Our court rejected the claim of error because the defendant "was never shown to be, nor did he ever claim to be, a resident." (*Id.* at p. 1327.) The court explained, "[S]ection 198.5 creates a rebuttable presumption that anyone who employs deadly force against an intruder '*within his residence'* has done so in reasonable fear of imminent peril of death or great bodily injury. By its terms, the presumption benefits only *residents* defending their homes." (*Silvey*, *supra*, 58 Cal.App.4th at p. 1326, fn. omitted.) Because the defendant in *Silvey* "was no more than a guest" in the mobile home where he shot and killed a drunken, unwelcome visitor, the court held the defendant was not "covered by section 198.5." (*Id.* at p. 1328; compare *Grays*, *supra*, 246 Cal.App.4th 679, 687 [evidence warranted a jury instruction on section 198.5 presumption where defendant stayed at apartment for four or five months, paid rent and had key, qualifying as a resident].)

Like the defendant in *Silvey*, Boardman "was no more than a guest" in T.K.'s apartment. (*Silvey*, *supra*, 58 Cal.App.4th at p. 1328.) T.K. testified Boardman arrived the day before the incident and spent the night; Boardman himself testified that the day of the incident was his second day at the apartment. He admitted he "did not live there" and "was a guest [for] a temporary time." Because there was no evidence Boardman was a resident of the apartment, he was not entitled to an instruction on the section 198.5 presumption of reasonable fear. Consequently, the trial court did not err in refusing to instruct the jury with CALCRIM 3477.

In his reply brief, Boardman argues that the trial court's decision to instruct the jury with CALCRIM No. 3475, regarding the right of "'a *lawful occupant* of a home'" to use force against an intruder, is inconsistent with its rejection of CALCRIM No.3477, regarding the right of a "residential occupant" in the same situation. Boardman

argues there is "no difference" between "a 'residential occupant' under section 198.5" and "a 'lawful occupant of a home' under CALCRIM No. 3475"; thus, the facts compelling the court to give CALCRIM No. 3475 also supported instructing with CALCRIM 3477, and the court therefore erred in failing to give the latter instruction.

Boardman's argument is built on a faulty premise. He offers no authority for his assertion the law sees no "no difference" between the home protection rights of "residential occupants" and "lawful occupants." In fact, the law recognizes a significant difference between the rights of each group. *Silvey, supra,* 58 Cal.App.4th 1320 explained the unique rights accorded "residents" under secton 198.5 as follows: "California law . . . extends the presumption of 'a reasonable fear of imminent peril of death or great bodily injury' only to residents ([] § 198.5). This makes sense. It is a judgment rooted in our veneration of home and our recognition that the resident is in the best position to assess an ostensible threat to the home, consider any extenuating circumstances, and determine what response is necessary." (*Silvey, supra,* at p. 1326.) We conclude the trial court properly found Boardman, a nonresident, was not entitled to the presumption of reasonable fear under section 198.5.

C. *Substantial Evidence Supports the Jury's Findings Boardman Did Not Act in Self-Defense*

Boardman contends as a matter of law the prosecutor failed to prove he did not act in self-defense when he used a deadly weapon against Wayne (count 2), and when he assaulted and battered Douglas (counts 3 & 4). The contention lacks merit.

Self-defense is a complete defense to assault, battery, and assault with a deadly weapon if the defendant reasonably believed he was in imminent danger of suffering bodily injury and needed to use force to defend himself against that danger, and used only reasonably necessary force in doing so. (CALCRIM No. 3470.) The prosecutor has the burden to prove beyond a reasonable doubt that a defendant did not act

in self-defense. (*Ibid.*) We review the jury's findings that Boardman did not act in self-defense under the substantial evidence standard of review.

Under that standard, we must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Johnson* (1980) 26 Cal.3d 557, 578 (*Johnson*).) The trier of fact is entitled to draw reasonable inferences from the evidence and a reviewing court should """presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."""" (*People v. Rayford* (1994) 9 Cal.4th 1, 23, quoting *Johnson, supra*, 26 Cal.3d at p. 576.) A reviewing court should determine if the evidence presented supports the jury's findings, but a reviewing court's "opinion that the circumstances also might reasonably be reconciled with a contrary finding does not warrant reversal of the judgment." (*People v. Proctor* (1992) 4 Cal.4th 499, 528-529.) Importantly, we do not "reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses. [Citation.]" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206, ; *People v. Jones* (1990) 51 Cal.3d 294, 314.)

In challenging the jury's findings that he did not act in self-defense as to counts 2, 3, or 4, Boardman disregards the standard of review and effectively asks this court to reweigh the evidence and credit his version of events rather than the version the jury believed. We decline to do so. Interpreting the evidence in the light most favorable to the judgment, as we must, we conclude substantial evidence supports the jury's findings Boardman did not act in self-defense, but was, instead, the aggressor in his encounters with both Douglas and Wayne.

As to his encounter with Douglas, the evidence showed Boardman left the safety of the patio area and picked up a knife before Douglas did or said anything menacing to Boardman. When Douglas saw Boardman point the knife at him, he backed away; Douglas had no weapon, and both T.K. and Rangel saw Douglas "jumping back."

Rangel observed Douglas's hands were up as he appeared to be "dodging" and trying to protect himself. It is undisputed Boardman struck the first blow, punching Douglas in the jaw. Moreover, Boardman admitted that when T.K. came between them as they fought in the kitchen, Douglas stopped trying to hit Boardman and simply argued with Boardman instead. This evidence amply supports the jury's finding Boardman was not defending himself but was the aggressor when he confronted Douglas.

The evidence likewise supports the jury's finding Boardman did not act in self-defense when he encountered Wayne outside the apartment. Although Boardman testified Wayne first swung at him, other witnesses testified they saw Boardman "push" or "punch[] at" Wayne as Boardman ran past him, fleeing the apartment where he had just stabbed T.K. Rangel testified she saw Wayne "put his arms up, like, trying to protect his self" as Boardman was "punching at him[.]"

Boardman tries to discredit the testimony against him, arguing, for example, that Rangel was biased because she had a motive to protect Wayne, her granddaughter's boyfriend, from being portrayed as the aggressor. ~**(AOB 52)**~ But the jury resolved these credibility disputes against Boardman and rejected his testimony that Wayne swung at him first, causing Boardman to swing at Wayne only in self-defense.

We conclude substantial evidence supports the jury's findings Boardman did not act in self-defense as to his aggravated assault against Wayne or his assault and battery against Douglas.

D. *Substantial Evidence Supports the Jury's Finding Boardman Did Not "Accidentally" Knife Wayne*

Boardman argues, alternatively, that "there was a sufficient showing" Boardman's knifing of Wayne was accidental. At Boardman's request, the court instructed the jury on the affirmative defense of "accident": "The defendant is not guilty of any crime if he acted without the intent required for that crime, but acted instead

accidentally. . . ." (See CALCRIM No. 3404; see *People v. Lara* (1996) 44 Cal.App.4th 102, 110 ["The accident defense amounts to a claim that the defendant acted without forming the mental state necessary to make his or her actions a crime"].) Boardman contends the evidence showed "he did not have the mental state to commit the assault against [Wayne] since he was merely fleeing the apartment after his encounter with [Douglas]."

Boardman again asks this court to reweigh the evidence and interpret the facts differently than the jury. He suggests he "may have run into [Wayne] on his way out the door," and "it was likely [Wayne] may have *come in contact* with the knife through no fault of [Boardman]." (Italics added.) In an even greater stretch, Boardman contends [Wayne]'s disheveled state and torn shirt, observed by Deputy Soto at the scene, "may have been caused by [Boardman] accidentally running into [Wayne] when fleeing with the knife in [his] hand," rather than as a result of what witness Rangel described as Boardman "punching at [Wayne.]"

Boardman is wrong in arguing the prosecution failed to prove "the assault against [Wayne] was not an accident." Viewed in the light most favorable to the prosecution, the evidence was sufficient to prove Boardman stabbed Wayne not accidentally but intentionally. Witnesses testified Boardman "hit" or "[was] punching at" Wayne; on the stand Boardman admitted his intent to assault Wayne based on his interpretation of Wayne's body language, and he admitted striking Wayne in his face after Wayne purportedly took a first swing at him. Though Boardman claimed he had been unaware Wayne had been stabbed and hypothesized the injury may have happened unintentionally as he swung his arms backwards while running away, the jury reasonably drew other conclusions, finding the stabbing was no accident. Substantial evidence supports that finding.

E. *The Trial Court Did Not Abuse its Discretion in Denying Boardman's New Trial Motion*

Boardman argues the trial court erred when it denied his motion for new trial based on the prosecutor's failure to disclose material information to the defense before trial. A trial court's ruling on a motion for new trial "'"rests so completely within [its] discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears."'" (*People v. Delgado* (1993) 5 Cal.4th 312, 328 (*Delgado*).) We find no such abuse of discretion here.

After trial and before sentencing, Boardman moved for a new trial alleging *Brady* violations based on the prosecutor's failure to disclose timely three pieces of material information. (*Brady v. Maryland* (1963) 373 U.S. 83, 87 (*Brady*) [prosecution's failure to disclose material, exculpatory evidence before trial violates due process].) The undisclosed evidence consisted of the following: (1) the fact T.K. had a pending felony case; (2) the fact Wayne had a prior conviction of misdemeanor battery; and (3) the fact T.K. and Douglas began living together shortly after the incident, which defense counsel learned "two-thirds of the way through his cross-examination of [Douglas]."

At the hearing on the new trial motion, the trial court acknowledged Boardman's right under section 1054.1 to all the information at issue and found "[t]here are violations here." The court pointed out, however, that "*Brady* requires more than that[] [t]o be the basis for a reversal of a trial conviction." The court stated the fundamental question in determining whether the statutory discovery violations "require a new trial . . . is, despite the violations, did Mr. Boardman receive a fair trial[?]" (4 RT 773) The court concluded Boardman did. The court stated: "Despite the court's concern and disappointment that appropriate discovery was not made in advance of trial, I don't think that this lack of discovery prejudiced Mr. Boardman with respect to his right to receive a fair trial . . . . [H]e did have a fair trial." Boardman challenges that finding as erroneous.

In moving for mistrial, Boardman had the burden of proving the undisclosed evidence was "'material,'" i.e., that "'there is a reasonable probability that, had [it] been disclosed to the defense, the result [at trial] . . . would have been different.'" (*In re Sassounian* (1995) 9 Cal.4th 535, 544 (*Sassounian*).) In assessing that "probability," the trial court was required to "consider[] the evidence in question under the totality of the relevant circumstances and not in isolation or in the abstract. [Citation.]" (*Ibid.*)

Engaging in the requisite holistic analysis, the trial court reasonably concluded Boardman suffered no prejudice from the prosecutor's discovery violations on two of the facts in issue: T.K.'s pending felony charge and Wayne's prior misdemeanor battery conviction. The court noted defense counsel independently discovered T.K.'s pending felony charge two weeks before trial and thus had the information "at a time when its discovery was meaningful" and "when they could have dealt with it" had defense counsel chosen to use the information to impeach T.K.

As for Wayne's prior misdemeanor battery conviction, the court noted Wayne did not testify, so the prosecutor's failure to disclose this impeachment evidence had minimal effect on the trial. More importantly, the court pointed out that, had Wayne testified, defense counsel would have opened "a can of worms . . . strategically and tactically" by using Wayne's misdemeanor conviction to argue that Wayne was the aggressor. Doing so would have opened the door to Boardman's extensive and far more violent criminal history involving "multiple robberies, multiple felony assaults, [and] an attempted murder." The court found "no competent lawyer . . . could have concluded that he would put that in and open the door to possible exposure of . . . [Boardman's] background to this jury since I had bifurcated the long strain of serious priors."

The trial court faced a more difficult task assessing the prejudicial effect of the prosecution's failure to disclose T.K. and Douglas had been living together soon after the incident. Defense counsel argued this was important impeachment evidence he could

have used to reveal T.K.'s motive to falsely portray Boardman as the aggressor rather than Douglas, her current romantic partner.

The trial court noted that Douglas's revelation during his cross-examination by defense counsel that he was living was T.K. surprised both attorneys and the court.[2] In light of that surprise, the court stated it had been puzzled by defense counsel's failure to bring a *Brady* motion or request a continuance at that point of the trial, when "the court could have dealt with it, perhaps." The court explained defense counsel could have recalled T.K. to the stand if he wanted to cross-examine her about living with Douglas. The court therefore implicitly found the revelation of this information during trial, when defense counsel had at least some ability to use the information to impeach T.K., lessened the prejudicial effect of its nondisclosure.

On appeal, Boardman argues that, because "the information came as a total surprise . . . [c]ounsel could not have prepared for this situation and was unable to reflect on the effects thereof until after trial. It is without question that had the information been disclosed pretrial, counsel for appellant could have inquired of both with respect to any bias and properly prepared for coss-examination [sic] of the witnesses." That argument, however, does not address the trial court's concern with defense counsel's failure to exploit the information during trial, such as moving for a continuance or a mistrial or to recall T.K., while "the court could have dealt with it, perhaps."

More to the point, Boardman failed to meet his burden of proving "'there is a reasonable probability'" that, had the prosecutor earlier disclosed to the defense T.K.'s and Douglas's living situation, "'the result . . . would have been different.'" (*Sassounian*, *supra*, 9 Cal.4th at p. 544.) Having failed to make that showing in the trial court, Boardman likewise fails on appeal to demonstrate the court's denial of his mistrial

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[2] The parties agreed the prosecutor did not know before trial that Douglas and T.K. were living together, but the Orange County District Attorney's Office staff did know of that fact, having sent the subpoenas to both witnesses at the same address.

motion was the sort of "'"manifest and unmistakable abuse of discretion"'" that justifies reversal of the judgment. (*Delgado*, *supra*, 5 Cal.4th at p. 328.)

F. *Boardman Is Entitled to Resentencing*

Boardman argues, and respondent concedes, that recent statutory changes mandate a remand to the trial court for resentencing. We agree.

Senate Bill No. 1393, effective January 1, 2019, gives the trial court discretion to dismiss prior serious felony enhancements in the interests of justice. By its terms, Senate Bill No. 1393 amends section 1385 to delete the restriction preventing a judge from striking or dismissing prior serious felony convictions, and amends section 667, subdivision (a), to delete the reference to the restriction previously set forth in section 1385, subdivision (b).

Under *In re Estrada* (1965) 63 Cal.2d 740, a court must assume the Legislature intended such sentence-ameliorating legislation to apply to all defendants whose judgments are not yet final on the statute's operative date, unless a contrary legislative intent is demonstrated in the language of the new law or its legislative history. (*Id.* at p. 742.) Respondent concedes Senate Bill No. 1393 reflects no such limiting intent, and thus applies to all cases not yet final as of January 1, 2019, including this case. Consequently, we remand this case to the trial court for purposes of exercising its discretionary authority to strike or dismiss the prior serious felony enhancements under section 667, subdivision (a), imposed at time of sentencing.

III

DISPOSITION

The case is remanded to the trial court for resentencing consistent with this opinion. Following resentencing, the court is directed to issue an amended abstract of judgment and forward it to the California Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

ARONSON, ACTING P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.